IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 285 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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THAKOR MAFAJI MOHANJI AND ANOTHER - Appellants
Versus
STATE OF GUJARAT - Respondent

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Appearance :
MR JV MEHTA for the Appellants.
MR KP RAVAL, ADDITIONAL PUBLIC PROSECUTOR for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 21/11/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred under Section 374 (2) of the Code of Criminal Procedure ("the Code", for short) against the order dated 22-01-1993 of conviction passed by the learned Additional Sessions Judge, Mehsana in Sessions Case No. 58 of 1988, by which the learned Judge convicted the appellants for the offences punishable under Section 302 for life imprisonment read with Section 34 of the Indian Penal Code, 1860 ("the IPC", for the short).

2. The short facts giving rise to the present appeal are as under:-

On the day of incident i.e. 13-11-1987, at about 8.00 O'clock at night, when the deceased and his brother reached near the scene of offence, while coming from their field to their village, the appellants and their juvenile son came out with the stick and a *dhoka* (a wooden log / short bat - a thick and short piece of wood used to beat clothes while washing), and appellant Nos. 1 and 2 started giving stick and *dhoka* blows to the deceased. As a result thereof, the brother of the deceased tried to run away towards the village and according to the prosecution, even the appellants had also left the scene of offence. Thereafter, the complainant and two wives of the deceased brought the deceased to their residence, and on the next day, before they could take him to the hospital, he succumbed to the injuries. Therefore, the complaint to that effect was lodged with the concerned Police Station by the complainant with the help of *Sarpanch*, who is a

relative and family friend of the deceased. On receiving the complaint, the offence was registered and accordingly, the Investigation Officer began conducting the investigation. Firstly, he has made inquest *panchnama* and, thereafter, he made arrangement to send the dead body of the deceased for post-mortem. He also went to the scene of offence along with *panchas* and prepared the *panchnama* of the scene of offence. Thereafter, he recorded the statements of various witnesses including that of the neighbours, who are staying near the scene of offence, as well as two wives of the deceased, etc. Later on, the accused were arrested and sent to judicial custody. The clothes worn by the deceased at the time of incident were seized by way of *panchnama* along with the clothes of the accused. Thereafter, *muddamal*, which was seized, has been sent to FSL. He has also collected the post-mortem notes and Death Certificate. On receiving the FSL Report and at the end of investigation, he has submitted the charge-sheet in the Court below. As the offence is exclusively triable by the Court of Sessions, the Court below committed the case to the Court of Sessions and on receiving the same, it has been numbered as Sessions Case No. 58 of 1988. Thereafter, the learned Sessions Judge framed the charge against the appellants *vide* Exh. 3 for the offences punishable under Section 302 read with Section 34 of the IPC and Section 135 of the Bombay Police Act, 1951. The appellants pleaded not guilty to the charge against them. Therefore, in order to prove guilt of the accused, the prosecution has examined the following witnesses:

(i) PW-1 Dr. Laxmanbhai Madhavdas Patel *vide* Exh. 9;
(ii) PW-2 Dalabhai Karshanbhai *vide* Exh. 17;
(iii) PW-3 Yusufbhai Rahimbhai Belim *vide* Exh. 19;
(iv) PW-4 Chenjiji Ghemarji *vide* Exh. 25;
(v) PW-5 Kantaben Jehamji *vide* Exh. 27;
(vi) PW-6 Badarji Bhikhaji *vide* Exh. 28;
(vii) PW-7 Arvindbhai Manubhai Patel *vide* Exh. 29; and,
(viii) PW-8 Labhashanker Vitthalram Dave *vide* Exh. 30.

The prosecution has also placed reliance on following documents:

(i) Certificate issued by N. L. General Hospital, Patan *vide* Exh. 10;
(ii) Certificate regarding cause of death issued by Dr. L. M. Patel *vide* Exh. 11;
(iii) *Panchnama* with regard seizure of the clothes put on by the deceased *vide* Exh. 12;
(iv) Letter written by Deputy Director, Forensic Science Laboratory to the Police Inspector, with regard to analysis of *muddamal* articles, *vide* Exh. 13;
(v) Viscera report of the deceased given by FSL *vide* Exh. 14;
(vi) *Panchnama* of the seizure of two sticks and one *dhoka* prepared in the presence of the *panch-witnesses vide* Exh. 18;
(vii) Inquest Report of the deceased *vide* Exh. 20;
(viii) *Panchnama* with regard to the place of

incident *vide* Exh. 21;

(ix) *Panchnama* prepared with regard to the clothes produced by Police Constable Mohanbhai Bhadarbhai of the deceased after the post-mortem in the presence of *panch-witnesses vide* Exh. 22;

(x) The complaint by Chenjiji Ghemarji *vide* Exh. 26; etc.

3. At the conclusion of the trial, further statements of both the appellants-accused were recorded under Section 313 of the Code and, thereafter, after giving the opportunity to the accused concerned, the learned Judge has convicted the accused as stated above. Being aggrieved and dissatisfied with the judgment and order passed by the learned Sessions Judge, the appellants have preferred this appeal.

4.1 Mr. J. V. Mehta, learned Advocate representing the appellants, submitted that the order of conviction passed by the learned Sessions Judge is against law and evidence on the record of the case. He took us to the oral deposition adduced by PW-1 Dr. Laxman Madhavdas Patel, Exh. 9, and submitted that the Doctor has categorically stated that he could not say that the deceased had sustained injuries as a result of the blows given with the sticks. He also took us to the depositions given by PW-4 Chenjiji Ghemarji, Exh. 25, and PW-5 Kantaben Jehamji, Exh. 27, and submitted that these depositions can be termed as the ones given by the interested witnesses or related witnesses and their evidence requires to

be evaluated with great care and circumspection. He submitted that the prosecution has also failed to prove that they are the witnesses of incident or that they are the eye-witnesses.

4.2 After referring to the oral evidence of the witnesses, it has been further argued by him that the distance between the scene of offence and the house of the deceased, which is situated in village, is such that even if one wants to reach there, it will at least take 20 minutes and, therefore, it has been established that they reached the scene of offence admittedly after the incident had taken place and he also vehemently argued that even the complainant was also not an eye-witnesses, but he is a got-up eye-witneess for the purpose of proving the case.

4.3 It has also been argued by him that the prosecution has failed to establish that the appellants are responsible for the injuries which are alleged to have been received by the deceased, and in absence of cogent evidence to connect them with the crime in question, benefit of doubt is required to be given to them. For these reasons, he urged that the appellants be acquitted.

4.4. The learned Advocate representing the appellants has cited the following judgments in support of the submissions canvassed at the Bar:

(i) State of Karnataka Vs. Shivalingaiah, AIR 1988 SC 115;

(ii) K. Ramakirshnan Unnithan Vs. State of

Kerala, AIR 1999 SC 1428;

(iii) Pashora Singh and Another Vs. State of Punjab, AIR 1993 SC 1256;

(iv) Rajinder Vs. State of Haryana, (2006) 2 SCC (Cri) 469;

(v) Sandhya Jadhav (Smt) Vs. State of Maharashtra, (2006) 2 SCC (Cri) 394; and,

(vi) Hafiz Vs. State of U. P., AIR 2006 SC 632.

5.1 Mr. K. C. Raval, learned Additional Public Prosecutor, representing the State, placed reliance on the evidence of the complainant PW-4 Chenjiji Ghemarji, Exh. 25 and submitted that the complainant has deposed that on 13-11-1987 at about 8 PM at night, the appellants, who were armed with a stick and a *dhoka*, gave stick blows to the deceased on the head and in the lower part of the abdomen and the deceased succumbed to the injuries and died on the spot. Appellant No. 1 was suspecting illicit relation by the deceased with appellant No. 2 and, therefore, he got infuriated and started beating the deceased. Appellant No. 2, who was also armed with *dhoka*, started beating the deceased. Even the son of the appellants joined in the beating of the deceased and thus, the deceased sustained serious injuries. He also submitted that the deposition given by the complainant fully corroborates the deposition of the wife of the deceased PW-5 Kantabai Jehalji, Exh. 27. Even the complaint given by Chenjiji Ghemarji *vide* Exh. 26 further corroborates the deposition adduced by both the witnesses.

5.2 He referred to the evidence of PW-2 Dr. L. N. Patel, Exh. 9, and submitted that Dr. Patel has deposed that the internal and external injuries sustained by the deceased were prior to his death. He also referred to the judgment delivered by the Court below along with documentary as well as oral evidence, more particularly, evidence of the wife of the deceased, complainant, brother of the deceased and other person who has prepared post-mortem notes, Investigating Officer and other witnesses. Lastly, the learned Additional Public Prosecutor submitted that the Court below has delivered a sound and reasoned judgment which does not require any interference by this Court.

6. This Court has heard Mr. J. V. Mehta, learned Advocate for the appellants-accused and Mr. K. C. Raval, Additional Public Prosecutor for the respondent-State, at length and in great detail. This court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable possibilities of the case. We have taken into consideration the oral deposition and the documentary evidence adduced by the prosecution in order to prove the guilt of the appellant in the commission of the offence. The prosecution has examined 8 witnesses.

7. The prosecution has, in our view, established the homicidal death of the deceased Jehamji Ghemarji. However, considering the entire

gamut of oral deposition and the documentary evidence, the prosecution, in our view, is also required to establish each and every link connecting the appellants with the commission of offence. It is also incumbent upon the prosecution to prove that the appellants were not only armed with sticks and *dhoka* but they assaulted the deceased on the head in the lower part of the abdomen and testicles, which resulted in the death of the deceased.

8.1 As per the deposition adduced by PW-4 Chenjiji Ghemarji, Exh. 25, the incident in question took place on 13-11-1987 at about 8.00 PM when he along with the deceased-brother were returning to the village. At that time, they were accosted by the appellants-accused. Appellant Nos. 1 and 2, who were armed with stick and *dhoka* started beating the deceased with stick and *dhoka*. PW-4 Chenjiji Ghemarji has further deposed that the place where the incident took place was surrounded by other houses and nobody from the neighbourhood turned up to save the deceased from the severe beating which was inflicted by the appellants-accused. He has further deposed that from the place of incident, the house of the appellants-accused is at a distance of 20 minutes. When he went to the village and shouted for help, nobody from the neighbourhood turned up to the scene of offence so as to save or help the deceased. It has been further deposed by this witness that the deceased was subsequently brought to the house and even he was not taken anywhere for any treatment and

even the complainant or family members of the deceased have not informed anybody in village regarding the incident or asked for any help, and as per the deposition of the complainant, for the first time, in the morning, they tried to fetch a vehicle and he went to nearby village, but he has admitted in his cross-examination that the *Sarpanch* is also having a vehicle and the said *Sarpanch* is also a family friend and relative of the deceased, but as per the prosecution, they have not informed anybody or they have not taken the deceased to the hospital. Even as per the evidence on record, the deceased died next day morning at about 8 - 9 AM. Till, then, nobody was informed. The complainant could as well have called the *Sarpanch* on the night of the incident i.e. on 13-11-1987 as soon as the deceased was brought to the house. This conduct of the complainant is inexplicable. It raises doubt about the incident as well as inextricable involvement of the appellants in the commission of offence.

8.2 We have minutely examined the oral evidence of the two important witnesses on which the prosecution has placed reliance i.e. the complainant, who is the brother of the deceased and Kantaben, who is one of the wives of the deceased. It is required to be noted that the statement of the second wife of the deceased has been recorded but she has not been examined by the prosecution. So, in short, there are three witnesses and as per the evidence on record, which we have minutely evaluated, it shows that the

distance between the scene of offence and the house of the deceased is a walkable distance of about 20 minutes, and admittedly, the complainant went to the village and on reaching the village, he shouted for help. Meanwhile, both the wives of the deceased came there and thereafter, they came to the scene of offence. So, admittedly, when they reached there, incident had already taken place and, therefore, we are unable to accept the argument advanced by the learned Additional Public Prosecutor that they are the eye-witnesses to the incident in question, but, in the circumstances narrated hereinabove, we accept the argument advanced by the learned Counsel for the appellants that the wife of the deceased is not the witness of incident, but she reached there later on. It has also been established from the evidence on record that the incident took place on the lane near the field where one cannot see easily from a certain distance unless he reaches the scene of offence.

8.3 As far as the complainant is concerned, we have examined his evidence in detail along with his behaviour and we are of the opinion that he might not be a person who accompanied with the deceased. His evidence is also creating doubt in the mind of the Court whether he is an eye-witness of the incident or not and keeping in mind all the aspects of the matter, we are of the opinion that it creates doubt in the mind of the Court.

8.4 The prosecution has further placed heavy

reliance on the deposition adduced by PW-6 Badarji Bhikhaji at Exh. 28. He has deposed in his testimony that the incident in question took place on 13-11-1987 at about 8.00 PM. He had not seen the incident and on the date of the incident, he was relaxing in his house. On hearing the shouts from the complainant, he ran to the place of incident along with Laxmiben and PW-5 Kantaben Jehamji. They met the complainant near the gate of the village. On further inquiry being made by him, he was told by the complainant that the appellants-accused were beating the deceased with stick and *dhoka* on the head, in the abdomen as well as on his testicles. Save and except the aforesaid version, he had not seen the incident. As per the say of PW-6 Badarji Bhikhaji, the deceased was brought to the house and before he could make necessary arrangements to fetch jeep to take the deceased to the hospital, he succumbed to the injuries. No other substantial material is pointed out from the cross-examination of PW-6 Badarji Bhikhaji at Exh. 28.

8.5 PW-5 Kantaben Jehamji, wife of the deceased Jehamji Ghemarji is examined *vide* Exh. 27. She was on the date of the incident doing house-hold work at her residence. On hearing the shouts from PW-4 Chenjiji Ghemarji, she went to the gate of the village along with Laxmiben. PW-4 Chenjiji Ghemarji narrated the incident to her as well as to Laxmiben and she was told that the appellants-accused were beating Jehamji Ghemarji with stick and *dhoka* on the

forehead, abdomen and on the testicles. Thereafter, Jehamji Ghemarji was brought to the house as he was unconscious. No arrangement could be made on the date of incident at night for immediate treatment of deceased Jehamji Ghemarji. On the next day in the morning, when the arrangement was made, Jehamji Ghemarji had succumbed to the injuries and, thereafter, the complaint was lodged against the appellants-accused. On perusal of the cross-examination, she has deposed that about 40 - 50 houses are situated in the village but nobody turned up from the village even on hearing the shouts for help. Even from the shops, which were situated in the nearby place, nobody turned up either to save the deceased or to render any help to the deceased. She has further deposed in the cross-examination that frantic efforts were made to fetch the vehicle to provide immediate treatment to the deceased. Even the *Sarpanch* who was having a tractor and a scooter was not approached for any help. But on the next day, the arrangement was made for taking the deceased to the hospital for treatment. Thus, PW-5 Kantaben Jehamji had not seen the incident. She has admitted in the deposition that several houses were situated nearby the place of incident, but nobody turned up to render any help to the deceased and after bringing the deceased to the house, he was taken to the hospital on the next day.

8.6 The prosecution has examined PW-1 Dr. Laxmanbhai Madhavdas Patel *vide* Exh. 9, who had

conducted autopsy on the dead-body of Jehalji Ghemarji. He has narrated in his testimony the internal injuries and the external injuries sustained by the deceased. He has also deposed in his testimony that the injuries caused at Sr. Nos. 2, 3 and 4 could have been caused with hard and blunt substance and such injuries would cause the death of a person in the ordinary course of nature.

8.7 Post-mortem note produced at Exh. 10 mentions the probable cause of the death was shock due to the injuries to the testes. Thereafter, on receipt of the Viscera Report, it has further been observed that the cause of the death was shock due to the injuries on testes.

8.8 PW-7 Arvindbhai Manubhai Patel *vide* Exh. 29 and PW-8 Labhashanker Vithalram Dave *vide* Exh. 30 are the witnesses, who had arrested the appellants-accused and proceeded with the investigation in the matter. The deposition adduced by these witnesses is of no help to the prosecution case as they were not the eye-witnesses to the incident. The documentary evidence, such as, *panchama* with regard to the seizure of clothes, the post-mortem report of the deceased issued by PW-1 Dr. L. M. Patel, the Death Certificate in respect of the cause of the death would, in our view, at the most, provide corroboration to the prosecution story.

8.9 Thus, looking to the deposition adduced by

the above mentioned prosecution witness, it becomes clear that after sustaining severe injuries, nobody from the neighbourhood came to the rescue of the deceased or to render any help or to save the deceased from the severe beating inflicted by the appellants-accused. The deceased even though sustained injuries was brought to the house and thereafter on the next day, he was taken to the hospital for providing treatment. Even though the *Sarpanch* was having a tractor and a scooter, he was not approached immediately for any help so as to take the deceased to the hospital. Thus, the conduct of the witnesses inexplicably remains strange and it raises doubt about the involvement of the appellants-accused in the commission of offence.

8.10 When the prosecution has miserably failed to prove the involvement of the appellants-accused beyond reasonable doubt in the commission of offence by adducing very cogent, convincing, conclusive or clinching evidence and the other side is able to establish the doubt, the prosecution story with regard to the assault committed by the appellant-accused on the deceased cannot be believed. It is true that the life of the deceased was snuffed out in a ghastly incident which took place on 13-11-1987 at about 8 O'clock and as per our discussion in earlier part of the judgment, it is a case of homicidal death, but the inextricable involvement of the appellants-accused in the commission of offence has not been established by the prosecution by producing

clinching evidence, and as there are many chinks in the armour of the prosecution case, the benefit of doubt, in our view, is required to be given to the appellants-accused.

9. For the foregoing reasons, the appeal is allowed. In the facts and circumstances narrated hereinabove, both the accused are given benefit of doubt and are acquitted. Since the appellants are on bail, their Bail Bonds shall stand cancelled. *Muddamal* be disposed of in terms of the order dated 22-01-1993 passed by the learned Additional Sessions Judge, Mehsana in Sessions Case No. 58 of 1988.

[R. P. DHOLAKIA, J.]

[H. B. ANTANI, J.]

/shamnath